Supreme Court, U.S.
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No. 91-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FANTASY, INC., d/b/a JONDORA/PARKER MUSIC,
Petitioner,

v.

JOHN MARASCALCO, d/b/a ROBIN HOOD MUSIC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under § 304(a) of the Copyright Act of 1976, when an assignment of the renewal term of copyright has been made by an author in the original term of copyright, when does the right of the assignee in and to the renewal term of copyright vest in that assignee so as to cut off the rights of the author's heirs?

LIST OF PARTIES

Petitioner's list of parties pursuant to Supreme Court Rule 14.1(b) is complete. As a natural person, respondent has neither parent companies nor subsidiary corporations, and falls outside the scope of Supreme Court Rule 29.1.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent John Marascalco, doing business as Robin Hood Music, respectfully prays that this honorable Court not issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 30, 1991.

I
INTRODUCTION

This Court should deny the petition because there is no conflict among the courts of appeal on this question. The decision below, *Marascalco v. Fantasy, Inc.*, 953 F.2d 469 (9th Cir. 1992), is the only appellate decision directly on this point.

The decision of the Ninth Circuit Court of Appeals follows the principles this Court recently affirmed in *Stewart v. Abend*, 495 U.S. 207 (1990), and other precedents of this Court in which the policies and legislative history underlying *Stewart* played a role.

In holding that the author must survive until the beginning of the renewal term for his or her heirs to be divested of their rights, the court of appeals carefully considered the statutory language and the legislative history of § 304(a) of the Copyright Act of 1976. The court of appeals construed the indeterminate language of § 304(a) in a way that gives the heirs of authors the maximum possible opportunity, consistent with the statute, to gain the "second chance" of owning valuable copyrights in their renewal term. This "second chance" policy has been at the core of the intent of Congress since at least the Copyright Act of 1831, and even has its roots in the Copyright Act of 1790. In this case, under the holding of the court of appeals, the heirs of one of the songwriters of the important musical composition "Good Golly Miss Molly" will get that "second chance," which is exactly what Congress

intended, and the principle which this Court recently upheld in *Stewart*.

Because the decision of the court of appeals correctly interprets the statute and upholds the policies behind § 304(a), there is no need for this Court to grant the petition for a writ of certiorari and decide this question anew.

II
SUMMARY OF ARGUMENT

The argument which follows considers the following points in greater detail:

1. Contrary to petitioner's assertions, there is no conflict between the decision of the Ninth Circuit Court of Appeals and that of any other appellate court [§ III].

2. No other reason exists for this Court to reconsider the decision of the Ninth Circuit Court of Appeals, because:

   a. the decision is consistent with this Court's precedents [§ IV];

   b. the decision is consistent with the legislative history of § 304(a) and the copyright laws in general [§ V]; and

c. the problems of divestment to which petitioner alludes are imaginary [§ VI].

3. The statutory language of Section 304(a) is far from having a "plain" meaning [§ VII].

III
BECAUSE NO CONFLICT OF APPELLATE DECISIONS EXISTS, THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. This Court will grant a petition for a writ of certiorari only when special and important reasons exist for doing so. Supreme Court Rule 10.1. The reason which stands out as one of the most compelling is a conflict among *appellate* courts. Supreme Court Rules 10.1(a) & 10.1(b).

Because the federal district courts have original and exclusive jurisdiction over "civil actions arising under any Act of Congress relating to . . . copyrights," 28 U.S.C. § 1338(a), most, if not all, such conflicts will develop when a United States court of appeals renders a decision in conflict with the decision another United States court of appeals on the same matter, which serves

as a ground for granting a writ of certiorari under Supreme Court Rule 10.1(a).[1]

This Court should deny this petition because there is no conflict among appellate courts. The decision of the Ninth Circuit Court of Appeals is the *only* appellate decision to hold precisely when the renewal term of copyright of a subsisting copyright vests if the author dies during the original term.

Petitioner has not cited a single decision by any other United States court of appeals or any state court of last resort which is squarely on point to support its position, or which conflicts with the decision below. There are some appellate decisions which have commented on the time-of-vesting issue, such as *Trust Co. Bank v. MGM/UA Entertainment Co.*, 772 F.2d 740 (11th Cir. 1985). That case, however, supports respondent's position, in holding that the author must survive to the beginning of the renewal term in order for an assignment of the renewal copyright period to vest; nevertheless, because the issue was not critical to the holding of the court, it has limited precedential value as dicta. Likewise, none of the cases from the Second Circuit petitioner cites have squarely ruled on this issue. The sole district court decision to rule on this precise

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[1] Petitioner has not cited, nor has respondent found, *any* state court decisions on this question, so none of the other situations involving conflicts among jurisdictions listed in Supreme Court Rules 10.1(a) and 10.1(b) apply.

issue before the district court in this action ruled in respondent's favor, comes from the Southern District of New York.[2]

IV
BECAUSE THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS, THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

Another reason for granting a petition for certiorari, in the absence of a conflict among appellate courts, is when a United States court of appeals or any state court has decided a federal question in a way that conflicts with applicable decisions of this Court. Supreme Court Rule 10.1(b). This Court should deny

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[2] That case, *Frederick Music Co. v. Sickler*, 708 F. Supp. 587 (S.D.N.Y. 1989) contained reasoning so flawed that the Ninth Circuit specifically noted its infirmity and rejected it. 953 F.2d 469, 475 (1992), Petitioner's Brief at p. A-15. *Frederick* misquoted the Copyright Acts of 1790 and 1831, and failed to analyze any copyright law enacted prior to 1870. Furthermore, contrary to petitioner's assertions that the law was settled in the Second Circuit over 30 years ago, the district court in *Capano Music v. Myers Music, Inc.*, 605 F. Supp. 692, 694-95 (S.D.N.Y. 1985) conceded that "The law is unsettled as to precisely which the renewal rights vest." 605 F. Supp. at 695 n.2.

the petition for a writ of certiorari because the decision of the court of appeals, affirming the ruling of the district court, is consistent with this Court's decision in *Stewart*, and other precedents.

A. THE DECISION OF THE COURT BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT REGARDING COPYRIGHT POLICY.

In *Stewart*, this Court recognized that it had not decided the time-of-vesting question in either *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), or in *Fred Fisher Co. v. Witmark & Sons*, 362 U.S. 643 (1943), two earlier cases construing the renewal term provisions of the Copyright Act of 1909. 495 U.S. at 220 n.2 The Court also declined to address the time-of-vesting question in *Stewart*, because the issue was not before the Court. *Id.* The jurisdictional limitation of requiring a case or controversy, U.S. CONST. Art. III, § 2, and prudential limitations prevent this Court from deciding matters not at issue.

Nevertheless, although this Court did not expressly decide the time-of-vesting question, the decision below is consistent with this Court's precedents, particularly *Stewart* and *Fisher*. There is no need for this Court to address every undecided question of federal law; the United States courts of appeals regularly extrapolate this Court's decisions in applying them to novel situations.

In *Stewart*, this Court reaffirmed and reinforced the long-standing policy that the renewal term is intended to benefit a deceased author's family, by affirming *Abend v. MCA, Inc.* 863 F.2d 1465 (9th Cir. 1988). In *Abend* the court of appeals enunciated two policies Congress intended to advance in providing for renewal terms. First, Congress had a "desire to give authors a 'second chance' to make a better deal" upon expiration of the original term. 863 F.2d at 1477. Second, and more importantly in this context, "Congress intended to provide protection to the author's family and so extended the renewal right to include the author's surviving family or heirs, *should the author die during the original term of copyright*. *Id.* (emphasis added).

In *Stewart*, this Court followed the reasoning of the court of appeals in *Abend*. The court of appeals below (the same court which decided *Abend*), relied on the same policy considerations in reaching its decisions. There is no reason to believe that those reasons are any less valid now, or that this Court would not turn to them again. The court of appeals below did what this Court did in *Stewart*: it interpreted § 304(a) in a way which affords an author's heirs the maximum opportunity to enjoy the renewal term of copyright. The interpretation of the statute which petitioner advances, that the rights of the heirs may be cut off by the author's death *before* the renewal term begins, is inconsistent with that long-standing policy.

The Ninth Circuit, in the opinion below, was highly sensitive to this Court's stated policy:

> In *Stewart v. Abend*, the Court revisited the extensive history of American copyright law. It again referred to the policy of the renewal provision which (1) affords authors a second opportunity to obtain remuneration for their works and (2) provides their statutory successors with a "new estate" if they die before the "renewal period" arrives. . . .
>
> . . . .
>
> The legislative history and the cases reflect that the core concern of § 304(a) is to provide the author and his statutory successors with a new opportunity to enjoy the benefits of a creative work that proves successful.

953 F.2d at 474-75, Petitioner's Brief at pp. A14-A15.

Because the decision of the court of appeals is completely consistent with the holding of this Court in the very recent *Stewart* decision, there is no reason for this Court to grant the petition.

B. THIS COURT HAS PREVIOUSLY TAKEN A POSITION WHICH IS CONSISTENT WITH THE DECISION OF THE COURT BELOW.

While never specifically deciding the question, this Court nevertheless has taken a position, supported by the legislative history, which leads logically to the

conclusion that vesting takes place only upon the first day of the renewal term.

In *Fisher*, this Court affirmed that the renewal term existed as a separate estate from the original term. In holding that the 1909 Act did not prevent assignment of the renewal term, it followed the reasoning of English courts, which held that "although *contingent* on the author's surviving the original fourteen-year period, [the right to renewal] could be assigned, and that if he did survive the assignment he was bound by the assignment." 318 U.S. at 648 (emphasis added). Conversely, if the author did not survive, the author's assignment did not bind the author's heirs. The author had a renewal term (a "second chance") which could be exercised during the author's life, but if the author did not survive the original term, the author's "second chance" went to the author's heirs.

In *Miller* this Court cited *Fisher* for the proposition that:

> An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period.

Miller 362 U.S. at 375. Although there is disagreement on this point, that is, what was meant by "renewal period" (the renewal term of copyright *or* the time in which to register the renewal term), there is no reason

to doubt that this Court used the phrase "renewal period" to mean anything else than "renewal term." The manner in which Justice Douglas described the premise of *Miller* bears this out. In setting forth the facts, he wrote: "*Before the expiration of the original copyright, Black died, leaving no widow or child.*" 362 U.S. at 374 (emphasis added). This sentence is on the page immediately preceding the use of the famous phrase "renewal period." It would not make sense that this stated factual premise would be turned into the opposite legal principle. The court below declined to follow petitioner's view of meaning of the phrase "renewal period." 953 F.2d at 474-75, Petitioner's Brief at pp. A14-A15.[3]

Therefore, the decision of the court of appeals is consistent with this Court's precedents, and the writ should be denied.

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[3] As it did before the court below, petitioner here again takes an internally inconsistent position: sometimes it takes the position that the time of vesting should be the first day of the 28th year, Petitioner's Brief 8-10, and most other instances it takes the position that the day of the renewal registration should be the vesting date, Petitioner's Brief, *passim*.

V

BECAUSE THE DECISION BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF § 304(a), THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

When it interpreted § 304(a) in *Stewart*, and when it interpreted former § 24 of Title 17 (the predecessor of § 304(a)) in *Fisher*, this Court relied heavily on the legislative history of the copyright laws. The court of appeals also looked to the legislative history of § 304(a), which supports its decision as well.

Section 304(a) was largely a reenactment of the same provision in the Copyright Act of 1909.[4] That provision was in turn the successor to an uninterrupted series of copyright laws which provided protection to authors and their heirs by means of renewal terms. With respect to the time-of-vesting question, § 304(a) effected no change in the policies behind the law since 1831. Moreover, even if the Copyright Act of 1976 had effected any change with respect to its policy of protecting authors and their heirs, Congress strengthened, rather than weakened, the protections accorded to authors and their heirs.

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[4] Act of March 4, 1909, c. 320, § 23, 35 Stat. 1075, 1080-81, 17 U.S.C. § 23, renumbered 17 U.S.C. § 24 by Act of March 15, 1940, c. 57, 54 Stat. 51.

A. SINCE AT LEAST 1831, CONGRESS HAS CONSISTENTLY ENACTED LEGISLATION TO PROVIDE FOR AN AUTHOR'S HEIRS.

1. The Copyright Act of 1790.

The Copyright Act of 1790, the first federal legislation on copyrights pursuant to the then newly-ratified Constitution, gave very limited protection to authors' survivors. Act of May 31, 1790, c. 18, 1 Stat. 124, 124. That Act provided that the author was given the copyright for an initial term of fourteen years, and

> if, at the expiration of the said term, the author or authors, or any of them, be living, . . . the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years.

The 1790 Copyright Act was based largely upon the earliest English copyright law, the *Statute of Anne* (8 Anne, c.19), enacted in 1709, which provided that:

> Sec. XI. Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of said copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

What is especially noteworthy about the first Congress's enactment of a copyright term modeled on the English *Statute of Anne* is the conscious decision to adopt a policy protecting the not only an author's rights, but (albeit to a limited extent) an author's surviving spouse and children.

Under the Articles of Confederation, all but one of the original thirteen states had enacted copyright laws. Some, like Massachusetts, enacted copyright statutes which granted a single term of copyright, ranging from 14 to 21 years. Many followed the example set by Maryland and passed copyright laws which followed the *Statute of Anne*. Still others, however, such as Connecticut, explicitly incorporated the construction made by the English courts, and conferred the right of renewal on the author and "his heirs and assigns." Congress had three different types of copyright term provisions to consider, yet it chose to use the model five of the original thirteen states had adopted prior to the ratification of the Constitution, *i.e.*, requiring survival to the renewal term for the author's right to vest, but allowing the vested copyright to pass to the author's successors for the remainder of the term. *Fisher*, *supra*, 318 U.S. at 650; B. RINGER, RENEWAL OF COPYRIGHT (1960) *reprinted as* COPYRIGHT LAW REVISION STUDY NO. 31, Sen. Judiciary Comm., 86th Cong., 2d Sess. 109-110 (1961) ("RINGER").

The earliest English and American copyright acts, therefore, provided the statutory scheme of renewal

terms, and expressly based the author's right of renewal upon his survival to the *expiration* of the original term.

2. *The Copyright Act of 1831.*

The Copyright Act of 1831, however, signaled an increase in copyright protection for authors and their survivors, by providing that *if the author did not survive* the original term, the right to renew the copyright would pass to the author's widow or children. Act of February 3, 1831, c. 16, § 2, 4 Stat. 436, 436-37. The 1831 Act still contained an express requirement that the author survive to the beginning of the renewal term of copyright for the renewal term to vest in him, but that the renewal term could vest in his survivors if he did not.

The intent of Congress in conferring an economic opportunity upon the families of deceased authors is unmistakable. The legislative history provides ample evidence that Congress intended to protect the author's family:

> [B]y the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them.

7 Register of Debates of the Committee on the Judiciary of the House of Representatives, app. CXIX (1830). This court recognized the epochal change wrought by the

1831 Act. *Fisher* contained a detailed discussion of the Acts of 1790 and 1831, noting that:

> Plainly, therefore, the Copyright Act of 1831 merely enlarged the benefits of copyright; it extended the length of the original term and gave the author's widow and children *that which theretofore they did not possess*, namely, the right of renewal to which the author would have been entitled if he had survived the original term. . . . By providing that, if the author should not survive the original term, his renewal interest should, instead of falling into the public domain, pass to his widow and children, *Congress was of course preferring the author to the bookseller*.

318 U.S. at 651 (emphasis added). But *Fisher* is not the only decision of this Court to recognize this epochal difference, as it has since noted that the 1831 legislation created:

> an entirely new policy, completely dissevering the title, breaking up the continuance . . . and vesting an absolutely new title eo nomine in the persons designated.

Stewart, 495 U.S. at 218, citing *White-Smith Music Publishing Co. v. Goff*, 187 F. 247, 250 (1st Cir. 1911).

3. *The Copyright Acts of 1870 and 1909.*

With respect to the renewal term, the Copyright Act of 1870 closely followed the language of the Copyright Act of 1831. Act of July 8, 1870, § 88, 16 Stat. 198, 212-13. The Copyright Act of 1909, extended the length of the renewal term to 28 years and expanded the list of possible successors to the author, going beyond the widow and children to the author's executor or next of kin.[5]

There is no reason to believe, however, that either the 1870 Act or 1909 Act changed the law with respect to the time of vesting. Admittedly neither the 1870 Act nor the 1909 Act contained an express requirement that the author survive until the beginning of the renewal term for the renewal term of copyright to be vested in the author or his heirs. Indeed, the statutes did not explicitly state when renewal rights vest. However, as recognized by the court of appeals below, Barbara Ringer, "one of the chief authorities on which [petitioner] relies, stated that the 1870 Act retained the renewal provisions of the 1831 Act without substantial change, and she noted that 'in the fragmentary history there is no indication that any change was considered or

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[5] See note 4, *supra*.

even suggested.'" 953 F.2d at 472, Petitioner's Brief at p. A-9, citing RINGER, *supra*, at 111-12.[6]

Next, in passing the 1909 Act, Congress did not intend to depart from the 1870 Act. The court below reached this conclusion, amply supported by the a statement taken from the legislative history of the 1909 Act, which this Court *also* utilized in *Stewart*: "The right of renewal is contingent. It does not vest until the end [*of the original term*]. If [the author] is alive at the time of renewal, then the original contract may pass it, but his widow or children would not be bound by that contract." (statement of Mr. Hale; the bracketed material was added by this Court) (emphasis added), 5 Legislative History of the 1909 Copyright Act, part K, 77 (E. Brylawski & A. Goldman eds. 1976), quoted in *Stewart*, 495 U.S., at 219-20.

4. The Copyright Act of 1976.

There is no indication that Congress, in enacting the 1976 Act, without change from the 1909 Act, intended that the date to which the author must survive would be altered from that which set expressly set forth in the earlier Acts. After all, the Acts of 1870 and 1909 certainly do not provide that the rights of the families of

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[6] Ms. Ringer in turn was citing this Court: "[W]hat scant material there is indicates that no substantial changes in the Act were intended." *De Sylva v. Ballentine*, 351 U.S. 570, 576 (1956).

authors be cut off merely because the author survived to the time when a renewal could be applied for.

The leading authority on copyright, Professor Nimmer, takes this position. He finds that the better view of the vesting issue is that the author must survive until the beginning of the 29th year in order for the rights to vest in the author's assignee so as to cut off the rights of the heirs. Nimmer bases this conclusion both on legislative history and on decisional law. On the legislative history, he wrote:

> It is then, pertinent to note (as did the opinion in the *Fisher* case) that the first copyright law adopted in 1790 and the revision in 1831 both expressly provided that the author be living at the "expiration" of the original term of copyright in order to be entitled to obtain the benefits of the renewal term. *This notwithstanding the fact that renewal copyright under each act had to be claimed within six months of the original term.* The Act of 1870, like the present Act, merely required that the author be living in order to obtain the renewal benefits without expressly stating that he must be living at the "expiration" of the original term. *There is, however, no indication of an intention to depart from this requirement as stated in the earlier copyright laws.*

2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 9.05[C], at 9-60 (rev. ed. 1991) (emphasis added). Based on the foregoing authorities, Professor Nimmer's assessment that there is "no indication" of a change of policy is quite accurate, and the Ninth Circuit adopted it ("The legislative history supports an interpretation of § 304(a) that perpetuates the explicit survival requirements of the 1790 and 1831 Acts. We find nothing to buttress a conclusion to the contrary.") 953 F.2d at 473, Petitioner's Brief at p. A-11.

B. THE COPYRIGHT ACT OF 1976 NOT ONLY RETAINED A POLICY OF PROVIDING FOR AN AUTHOR'S HEIRS, BUT ENHANCED THE RIGHTS OF COPYRIGHT.

As noted above, the Copyright Act of 1976 did not disturb the protections for an author's heirs which were already in place under the Copyright Act of 1909. Section 304(a) is taken verbatim from its predecessor statute and even petitioner admits that "section 304(a) is unquestionably a reenactment of section 24 of the 1909 Act, as amended." Petitioner's Brief 11 n.9.

Nevertheless, other changes which Congress did enact affirmatively enhanced the rights of authors and their heirs. To the extent that § 304(a) effected any change in existing law with respect to protecting heirs, the decision of the court of appeals interpreting § 304(a) is consistent with this overall scheme of reform, which

increased and broadened the scope of copyright protection afforded to authors and their heirs.

1. Congress Lengthened the Duration of Copyrights.

Until Congress enacted the most sweeping reforms in the Nation's copyright laws in 1976, copyright protection in the United States afforded only terms of short duration.[7] Under the current Copyright Act, however, copyright protection lasts much longer: for works created on or after January 1, 1978, copyright protection endures for the life of the author (or the longest living author) plus 50 years; for works by certain types of authors, copyright endures for a term of either 75 years after a work's first publication or 125 years after its creation, whichever expires first. 17 U.S.C. § 302.

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[7] The first copyright statute, the Copyright Act of 1790, provided for a term of 14 years and a renewal term of another 14 years. Act of May 31, 1790, c. 18, § 1, 1 Stat. 124, 124. In 1831, Congress lengthened the original term to 28 years, but kept the renewal term. Act of February 3, 1831, c. 16, § 2, 4 Stat. 436, 436-37. The following act kept the same term lengths. Act of July 8, 1870, c. 280, 16 Stat. 198. The 1909 Act increased the renewal term to match the length of the original 28-year term. Act of March 4, 1909, c. 320, § 23, 35 Stat. 1075, 1080-81, 17 U.S.C. § 23, renumbered 17 U.S.C. § 24, see also note 4, *supra*.

Congress also extended its generosity retroactively, for works already protected by statutory copyright on the effective date of the new Act. Congress nevertheless retained the two-term system of the predecessor statute, the Copyright Act of 1909.[8]

For subsisting copyrights in their renewal term, Congress extended the term of copyright for slightly more than 19 years,[9] without requiring any formality on the part of the copyright owner. 17 U.S.C. § 304(b). For subsisting copyrights in their original term, however, Congress made the 19-year-plus extension[10] conditional on registering the renewal copyright. 17 U.S.C. § 304(a).

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[8] The Copyright Act of 1909 further extended the duration of copyright by providing that both the original and renewal terms endure for 28-years. See note 4, *supra*.

[9] All terms of copyright now run to the end of the calendar year in which they would otherwise expire, which serves as an extension of up to almost a year. 17 U.S.C. § 305. This provision, in addition to extending copyright terms, makes renewals easier to register by eliminating the need to keep track of the precise date of registration.

[10] The new duration of renewal terms is 47 years, or 28 + 19; see also note 9, *supra*.

2. *Congress Instituted Another Form of Heir Protection.*

Although Congress eliminated the two-term system of copyright duration for new copyrights, Congress did not, however, abandon its long-standing concern with the welfare of authors and their heirs. Instead, Congress instituted an entirely new system of termination of transfers, in which the author of any work copyrighted under the new Copyright Act (or the author's heirs) can reclaim it during the *five-year* period beginning 35 years after its transfer. 17 U.S.C. § 203.

The decision below is consistent with this trend to broaden the scope of rights granted to authors and their heirs. The court of appeals held that this "second chance" belongs to the author's heirs if the author dies before the beginning of the renewal term, even if the renewal registration was made while the author was still alive in the original term.

VI
THE VESTING "PROBLEMS" TO WHICH PETITIONER ALLUDES ARE IMAGINARY

The other reason for granting a petition for a writ of certiorari, in the absence of a conflict among appellate court or a conflict with this Court's decisions, is when a United States court of appeals (or any state court) has decided an important question of federal law which has

not been, but should be, settled by this Court. Supreme Court Rule 10.1(b).

Petitioner voices great concern over the result of the decision below. In particular, petitioner frets that the decision will cause works to be in danger of falling into the public domain, in that petitioner argues that if, after having filed a valid renewal application, an author dies and his family, *i.e.*, the successor class, fails to file *another* renewal application, the work will fall into the public domain at the end of the 28th year. Petitioner's Brief 11.

This is simply not true, and under court of appeals' interpretation of § 304(a), works are not in danger of falling into the public domain. *Nowhere* does the statute require a *second* filing after the renewal application has been correctly filed in the 28th year of the original term of copyright. The statute requires that a valid renewal application be filed by a person with the right to do so, and once that is done, the copyright is renewed.

Petitioner also argues that the decision of the court of appeals makes copyrights renewed between 1948 and 2004 "vulnerable to divesting claims." The decision below, however, allows heirs of authors who die before the beginning of the renewal term to have the "second chance" that Congress has intended them to have for over 150 years. The Court heard some of the same cries of "divesting claims" in *Stewart*, and rejected them. In *Stewart*, this Court held that the rights of the

contingent successor are paramount over the right of the assignee, even though the original work was deeply and inextricably intertwined with a famous derivative work. Even though the result of that decision required a difficult accounting to be rendered to the successor of the author, this Court had little hesitation in upholding the basic premise of *Miller*, that if the author does not live long enough, "the purchaser has been deprived of nothing."[11]

VII
THE VIEW THAT THE STATUTORY LANGUAGE IS "PLAIN" HAS SCANT SUPPORT

The language of § 304(a) is certainly not "plain," as petitioner argues. The decision below held that "Since the statutory language is susceptible to more than one interpretation, [petitioner's] plain meaning analysis fails." 953 F.2d at 471, Petitioner's Brief at p. A-6.

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[11] This Court had before it all of the various warnings of an important section of the entertainment community that such a decision would be counter-productive to the creative process and stultify the economic value of copyrights, but it nevertheless upheld the logical extension of *Miller* as it applied to the facts of *Stewart*. 495 U.S. at 228 ("These arguments are better addressed by Congress than the Courts."). *See also Abend*, 863 F.2d at 1477-78.

And, except for one district court case (*Frederick*) and the dissent below (953 F.2d at 478, Petitioner's Brief at p. A-21), *no court* has *ever* maintained that the language is "plain." While petitioner argues vociferously that the language is "plain," it may be said with some certainty that the understanding of the meaning of the statutory language has been decidedly unsettled for quite some time.[12]

The majority below succinctly disposed of petitioner's "plain language" argument:

> The "shall be entitled"/"when" language of § 304(a) can fairly be read as describing merely a *necessary* condition. If a renewal is to vest at all, it must be perfected by a

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[12] Not only is petitioner's "plain meaning" argument eviscerated by the commentator petitioner cites most often (Barbara Ringer, the former Register of Copyrights, stated in 1961: "The present statute is silent as to vesting, and the question has never been directly presented to the courts." RINGER, *supra*, at 185), but the total lack of support for this argument demonstrated by the fact that if the language were so "plain," many more courts would have stated so, and not just the *Frederick* district court in 1990. The materials generated in connection with Congressional debate in the early 1960s show that there obviously was no common understanding of what the statute meant as to the time-of-vesting issue.

> timely registration application. The clause following "when" addresses itself to the mechanics of filing a timely registration application. So read, the statute suggests that Congress was intent on specifying the time for registration and not the time for vesting.

953 F.2d at 470, Petitioner's Brief at p. A-5 (emphasis in original).

VIII
CONCLUSION

For the foregoing reasons, the Court should not grant a writ of certiorari.

April 17, 1992

Respectfully submitted,

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